IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

IN RE:	§	
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SAN ANGELO PRO HOCKEY CLUB, INC.,	§	CASE NO. 02-60321-RLJ-11
	§	
DEBTOR	§	

MEMORANDUM OPINION

Before the court are the issues of whether damages should be awarded to San Angelo Pro Hockey Club, Inc., the Debtor and Debtor-in-Possession (the "Debtor"), for the City of San Angelo's (City's) violation of the automatic stay (11 U.S.C. § 362) concerning the Debtor's personal property and trade fixtures, and whether certain items of property constitute personal property, trade fixtures, fixtures, or leasehold improvements. These issues were originally raised by the Debtor's motion (the "Motion") seeking an order imposing an award of damages and, alternatively, for civil contempt against the City for violation of the automatic stay. The Motion alleged that the City violated the automatic stay by (i) failing and refusing to turn over control and possession of the Debtor's leased premises at the San Angelo Coliseum; (ii) failing and refusing to turn over to the Debtor control and possession of the leasehold improvements permanently affixed to the realty; (iii) refusing to allow the Debtor to exercise its right of possession and control over its personal property and trade fixtures located on the leased premises.

On an expedited setting, hearing on the Motion was held September 25, 2002. Upon request by the City, the court granted the parties until October 2, 2002, to file additional briefs on

the issues presented. On October 4, 2002, the court issued its findings of fact and conclusions of law from the bench, specifically holding as follows:

1. That there was no stay violation with respect to the leasehold premises as the court found the lease was terminated prior to the bankruptcy;

2. That the City did violate the stay as to the personal property and trade fixtures owned by the Debtor as the court found that such items were property of the bankruptcy estate;

3. That the evidence was insufficient to determine the characterization of specific items of property;

4. That the issue of damages and any questions regarding characterization of specific items of property would be set on the court's November 7, 2002, San Angelo docket;

5. That the court was making no findings regarding the Debtor's rights to payments from concessions;

6. That all relief requested by either of the parties under their motions was denied.[1]

See Court's October 4, 2002 ruling.

Hearing on the issues of whether damages should issue and questions concerning the characterization of specific items of property was, in accordance with the court's ruling, set on the court's November 7, 2002, docket. Upon request of the parties, the hearing was continued to December 9, 2002, and was held December 9-10 and January 13-14, 2003.

In accordance with the court's October 4, 2002 ruling, the court finds it has jurisdiction over the issues raised under 28 U.S.C. § 1334(b) and that this is a core proceeding under 28 U.S.C. § 157(b)(2) as it concerns section 362, the automatic stay; section 541, property of the

[1]Also heard on September 25, 2002, was the City's Motion for Stay of Proceedings and Abstention filed September 20, 2002. As indicated, the court denied the relief requested by the City's motion as part of its October 4, 2002, ruling.

estate; and addresses matters affecting the administration of the bankruptcy estate.

Background

The court refers to its specific findings and conclusions made from the bench on October 4, 2002. A copy of the transcript of the court's October 4, 2002 ruling is attached hereto. As background, the court notes that, as evident by the Debtor's name, the Debtor, prior to the bankruptcy filing, owned and operated the San Angelo hockey team, a minor league professional hockey team that is a member of the Central Hockey League. The team played at the San Angelo Coliseum under a lease agreement between the Debtor and the City. The Debtor's rights to the team were derived from a franchise with the League. As a result of several disputes between the Debtor and the City regarding payments under the lease (both as to whether all payments were made and the timeliness of payments), the issue of whether the lease could be terminated was submitted to binding arbitration. The arbitrator held for the City, which precipitated the bankruptcy filing and the Motion. The Debtor, by the Motion, contended that the arbitration ruling was ineffective. This court, in its October 4 ruling, held that the parties were bound by the arbitration award.

The central issue properly before this court was whether the City had committed a stay violation by denying any rights to the Debtor concerning the leasehold premises and all other property associated with the leasehold (personal property, fixtures, trade fixtures, and leasehold improvements). The arbitration award addressed only the leasehold premises. A stay violation was premised upon the Debtor retaining rights in property. *See* Court's October 4, 2002 ruling at 16-17. This necessitated that the court make certain findings regarding the Debtor's rights in property. The court, having found a stay violation by the City because the Debtor retained its

rights in personal property and trade fixtures, addresses first whether damages should issue for the City's stay violation. As contemplated by the court's October 4 ruling, the court will then address the characterization of specific items of property to resolve whether a stay violation occurred as to such items.

Discussion

A. Damages

The Debtor's damage model reflects total damages of $155,579.08. There are ten components to the model: (1) rental of ice plant - $48,000; (2) use of the glycol coolant - $14,192.78; (3) use of the homosote - $5,000; (4) use of the goal judge boxes - $800; (5) use of the VIP parking barriers - $800; (6) damage to ice-making equipment - $1,249.99; (7) value of missing equipment - $41,272 (includes four laser lights at $35,000); (8) storage of equipment for nine months - $15,300; (9) insurance for nine months - $3,843.78; (10) interest carry on loans secured by equipment - $25,120.53. *See* Debtor's Ex. 18. The Debtor reduced its damage claim by approximately $40,000 to account for items incorrectly listed as missing or damaged (as was discovered during the course of the hearing).

In addition, the Debtor seeks recovery of attorney's fees for prosecuting its motion of approximately $220,000 ($179,000 through November 30, 2002, plus an additional $41,000 incurred through the January hearings). *See* Debtor's Exs. 26-30.

Section 362(h) provides that "[a]n *individual* injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorney's fees, and, in appropriate circumstances, may recover punitive damages." 11 U.S.C. § 362(h) (2002) (emphasis added). As conceded by the parties here, the Debtor, as a corporation, may not

recover damages under section 362(h). *See In re Freemyer Indus. Pressure Inc.*, 281 B.R. 262, 268 (Bankr. N.D. Tex. 2002) (Lynn, J.); *First Republicbank Corp. v. NCNB Tex. Nat'l Bank (In re First Republicbank Corp.)*, 113 B.R. 277, 279 (Bankr. N.D. Tex. 1989) (Felsenthal, J.).[2]

The court may, however, award damages to a corporate debtor in enforcement of the court's civil contempt power or pursuant to its equitable powers under section 105 of the Code. *See In re Freemyer Indus. Pressure Inc.*, 281 B.R. at 269 (court relied on its equitable power under section 105 in assessing damages); *In re First Republicbank Corp.*, 113 B.R. at 279 (the court assessed damages for violation of stay to corporate debtor based on Rule 9020 and contempt).

Section 105 allows the court to issue orders or judgments "necessary or appropriate to carry out the provisions of . . ." the Bankruptcy Code. *In re Freemyer Indus. Pressure Inc.*, 281 B.R. at 269. The applicable provision here is section 362, the automatic stay. An award of damages in favor of a corporate debtor may provide an incentive for debtors to prosecute violations of the stay and for creditors to observe the limits imposed by the automatic stay. *See id.* Similarly, civil contempt as a sanction may serve to insure compliance with the automatic stay or to compensate a debtor for losses or damages sustained because of a stay violation. *See McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 69 S. Ct. 497, 499 (1949); *Jove Eng'g Inc. v. IRS (In re Jove Eng'g Inc.)*, 92 F.3d 1539, 1555 (11th Cir. 1996).

The Fifth Circuit has recognized that a major purpose of civil contempt is to compensate

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[2]This appears to be a majority view. *See, e.g., Sosne v. Reinert & Duree (In re Just Brakes Corp. Sys. Inc.)*, 108 F.3d 881, 884-85 (8th Cir. 1997); *Jove Eng'g Inc. v. IRS (In re Jove Eng'g Inc.)*, 92 F.3d 1539, 1550 (11th Cir. 1996); *Johnston Envtl. Corp. v. Knight (In re Goodman)*, 991 F.2d 613, 619 (9th Cir. 1993); *Maritime Asbestosis Legal Clinic v. LTV Steel Co. Inc. (In re Chateaugay Corp.)*, 920 F.2d 183, 186-87 (2d Cir. 1990). *But see Budget Serv. Co. v. Better Homes of Va. Inc.*, 804 F.2d 289, 292 (4th Cir. 1986).

a party for damages sustained as the result of a violation of a court order or injunction. *See American Airlines Inc. v. Allied Pilots Ass'n*, 228 F.3d 574, 585 (5th Cir. 2000). The automatic stay is a self-executing injunction, and therefore, for contempt purposes, constitutes an order issuing from the bankruptcy court. *See Gruntz v. County of Los Angeles*, 202 F.3d 1074, 1082 (9th Cir. 2000); *In re Jove Eng'g Inc.*, 92 F.3d at 1546.

As noted, section 362(h) requires a "willful" stay violation before damages will issue. Though section 362(h) is not applicable, the court, in determining whether damages should be awarded under either the court's equitable or contempt powers, begins its analysis by determining whether the City's conduct constitutes a willful violation of the stay. Willfulness within the context of an alleged stay violation is almost universally defined to mean intentional acts committed with knowledge of the bankruptcy petition. *See Fleet Mortgage Group Inc. v. Kaneb*, 196 F.3d 265, 269-70 (9th Cir. 1999); *Citizens Bank of Md. v. Strumpf (In re Strumpf)*, 37 F.3d at 155, 159 (4th Cir. 1994), *rev'd on other grounds*, 516 U.S. 16 (1995); *Price v. United States (In re Price)*, 42 F.3d 1068, 1071 (7th Cir. 1994); *Lansdale Family Rests. Inc. v. Weis Food Serv. (In re Lansdale Family Rests. Inc.)*, 977 F.2d 826, 829 (3d Cir. 1992); *Nissan Motor Acceptance Corp. v. Baker*, 239 B.R. 484, 488 (N.D. Tex. 1999).

Specific intent to violate the stay is not required for section 362(h) relief. *See Lansdale Family Rests. Inc.*, 977 F.2d at 829; *Nissan Motor Acceptance Corp.*, 239 B.R. at 488. Only the acts which violate the stay need be intentionally committed. *See In re Crysen/Montenay Energy Co.*, 902 F.2d 1098, 1104-5 (2d Cir.1990) (defining wilfulness as a deliberate act); *Lansdale Family Rests. Inc.*, 977 F.2d at 829. "A willful violation of the automatic stay provision is committed when the contemnor acts with knowledge of the filing of the bankruptcy petition." *In*

re Meinke, Peterson & Damer, 44 B.R. 105, 108 (Bankr. N.D. Tex. 1984) (Ford, J.). A creditor's good faith belief that he is not violating the stay is not determinative of the willfulness issue. *See id. See also Coats v. Vawter (In re Coats)*, 168 B.R. 159, 168 (Bankr. S.D. Tex. 1993).

The willfulness issue becomes more problematic where there is a legal uncertainty whether the stay applies or not to the creditor's conduct. *See University Med. Ctr. v. Sullivan (In re University Med. Ctr.)*, 973 F.2d 1065 (3d Cir. 1992); *U.S. v. Inslaw Inc.*, 932 F.2d 1467 (D.C. Cir. 1991).[3] This is best illustrated by the Third Circuit's holding in *Sullivan*.

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[3]In *Inslaw*, the D.C. Circuit found that the government's continuing use of intangible enhancements to a software program developed by the debtor was not a stay violation. *Inslaw Inc.*, 932 F.2d at 1472. The court stated that the government held a copy of the enhanced software under a claim of ownership and that Inslaw, the debtor, held no possessory interest in the software enhancements at the time the bankruptcy was filed. The court, in reversing the bankruptcy court, stated that the bankruptcy court identified the relevant property as Inslaw's intangible trade-secret rights in the software. *See id.* It commented that the bankruptcy court had found that the government's continuing use of these intangible enhancements was an "exercise of control" or property of the bankruptcy estate. *Id.* The court then stated as follows:

> If the bankruptcy court's idea of the scope of "exercise of control" were correct, the sweep of § 362(a) would be extraordinary–with a concomitant expansion of the jurisdiction of the bankruptcy court. Whenever a party against whom the bankrupt holds a cause of action (or other intangible property right) acted in accord with his view of the dispute rather than that of the debtor-in-possession or bankruptcy trustee, he would risk a determination by a bankruptcy court that he had "exercised control" over intangible rights (property) of the estate. In making that determination (one way or the other), the bankruptcy court would be exercising its "core" jurisdiction over the dispute, subject to review by an Article III court on fact issues only under the deferential "clearly erroneous" standard. See 28 U.S.C. § 158; Bankruptcy Rule 8013; 1 King, Collier on Bankruptcy ¶ 3.03[7]; see also 28 U.S.C. § 157(b) (1988) (identifying "core" proceedings); *Budget Service Co. v. Better Homes of Virginia, Inc.*, 804 F.2d 289, 292 (4th Cir.1986) (automatic stay violations are within the core).
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> Under this view, it does not matter whether the Department has possession of the PROMIS enhancements under a claim of outright title, as they do, or under a more limited lease or license. In both situations, a party in possession of an asset in which the bankrupt has an interest would violate § 362(a) by any act inconsistent with the bankrupt's claims as determined by the bankruptcy court. As a result, a wide range of disputes, such as a bankrupt lessor's claims against a lessee, or a bankrupt co-owner's claims against other holders of concurrent property interests, would slide into bankruptcy court.

Id. at 1472 & n.90.

In *Sullivan*, the Chapter 11 debtor, University Medical Center, was a Medicare provider. *Sullivan,* 973 F.2d at 1069-70. The Department of Health and Human Services (HHS) withheld payments due for postpetition services on the basis of overpayment for prepetition services. *See id.* at 1071. The bankruptcy court held that HHS's withholding of the payment violated the automatic stay and awarded attorney's fees and prejudgment interest. *See id.* After disposition through the district court, which affirmed in part and reversed in part, the court of appeals addressed the question of whether HHS's violation constituted a willful stay violation. *Id.* at 1071-72. The court held that HHS's conduct was not willful and thus the debtor was not entitled to attorney's fees and prejudgment interest. *Id.* at 1088-89.

In the court's analysis, the court recognized the definition of willfulness from its prior opinion. *See id.* at 1088 (quoting Cuffee v. Atlantic Bus. & Cmty. Corp. (In re Atlantic Bus. & Cmty. Corp.), 901 F.2d 325, 329 (3d Cir. N.J. 1990)). There, the Third Circuit defined willful as follows:

> A 'willful violation' does not require a specific intent to violate the automatic stay. Rather, the statute provides for damages upon a finding that the defendant knew of the automatic stay and that the defendant's actions which violated the stay were intentional. Whether the party believes in good faith that it had a right to the property is not relevant to whether the act was 'willful' or whether compensation must be awarded.

In re Atlantic Bus. & Cmty. Corp., 901 F.2d at 329 (quoting Goichman v. Bloom (In re Bloom), 875 F.2d 224, 227 (9th Cir.1989) [quoting Inslaw, Inc. v. United States (In re Inslaw Inc.), 83 B.R. 89, 165 (Bankr.D.D.C.1988)]). The court revisited the facts of *Atlantic Business* and recognized that the creditor's conduct in *Atlantic Business* was far more egregious than that of HHS. *See Sullivan*, 973 F.2d at 1087. Specifically, the creditor in *Atlantic Business* not only

violated the stay but also defied specific court orders directed to the creditor. *See id.* HHS acted through the Secretary of Health and Human Services. The court acknowledged that the Secretary's good faith belief that he was not violating the stay was insufficient under *Atlantic Business* to escape liability. *See id.* at 1088. However, the court recognized that

> the Secretary also had persuasive legal authority which supported his position. For this reason we conclude that the withholding by HHS did not fall within the parameters of 'willfulness' as such actions have been described in *Atlantic Business* and that the Secretary should not be penalized for the position he took toward UMC after the filing of the petition.

Id. The court further noted that "the law regarding the application of the stay to the Department's actions was sufficiently uncertain that HHS reasonably could have believed its actions to be in accord with the stay." *Id.*

As in *Sullivan*, the City, from an objective viewpoint, had a reasonable good faith belief that termination of the lease caused the personal property and trade fixtures to revert to the City. The City's reading of the lease was reasonable and defensible. The court found for the Debtor: the lease was ambiguous and such ambiguity was construed, in accordance with Texas law, to avoid a forfeiture. *See* Court's October 4, 2002 ruling. The court therefore held that the Debtor retained the personal property and trade fixtures. Until the court's ruling on October 4, 2002, ownership of the personal property and trade fixtures was legally uncertain and thus so was the question of whether the stay was violated. The City committed a technical stay violation; it did not commit a willful violation.

Having found the City did not commit a willful violation of the stay, should the court award damages, regardless?

The court recognizes that a finding of willfulness is not necessarily a prerequisite to

damages for contempt. *See McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 69 S. Ct. 497, 499 (1949); *Jove Eng'g Inc. v. IRS (In re Jove Eng'g Inc.)*, 92 F.3d 1539, 1555 (11th Cir. 1996). *But see In re Crysen/Montenay Energy Co. v. Esselen Assocs. Inc. (In re Crysen/Montenay Energy Co.)*, 902 F2d 1098, 1104-05 (2d Cir. 1990).[4] However, based upon several factors in this case, the court is convinced that an award of damages under either the court's contempt or equitable powers is inappropriate.

First, before the court will assess damages for contempt, the court must be convinced that the alleged contemnor is, at a minimum, sufficiently on notice that his conduct violates a court order. Such notice is less routine when the order at issue is, in effect, the imposition of a statutory provision (section 362) that applies to the world in general.

Second, as noted with respect to the "willfulness" discussion, an objective, bona fide dispute existed concerning whether the personal property and trade fixtures were property of the bankruptcy estate.

Third, the City's conduct cannot be faulted here. The Debtor filed this Chapter 11 case on August 7, 2002. By letter dated that same date, Debtor's counsel advised the City of the filing and that the City's continued "exercise of control over the Debtor's property" would constitute a stay violation. *See* Debtor's Ex. 6. By letter dated August 19, 2002, Debtor's counsel reiterated what had been stated in the August 7 letter, and that the City's conduct "may result in the Debtor seeking a determination that the City should be held in contempt of court . . . ." *See* Debtor's

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[4]In *Crysen/Montenay*, the Second Circuit decided the case under section 362(h) and therefore addressed the meaning of a "willful" stay violation. *In re Crysen/Montenay Energy Co.*, 902 F.2d at 1104-05. However, the court noted that prior to the 1984 enactment of subsection (h) of section 362, sanctions for stay violations were imposed pursuant to the court's contempt powers, which required a finding of malicious conduct; a good faith argument and belief that the questioned conduct did not violate the stay would also avoid a contempt finding. *See id.* at 1104.

Ex. 7. The August 19 letter emphasized that any actions by the City to terminate the lease were ineffective and thus the lease was "property of the Debtor's estate within the meaning of 11 U.S.C. § 541." *See id.* The letter further stated that the Debtor was entitled to possession of the leasehold premises, was the owner of its trade fixtures, and that the Debtor intended to reorganize. *See id.* Finally, the letter stated that Debtor's counsel was drafting a motion to seek redress for the City's stay violation. *See id.* The City was therefore on notice of the bankruptcy filing and the Debtor's intent to reorganize. The City's failure to affirmatively request the court's determination of whether it was justified in its position, i.e. whether it was engaging in a stay violation, is excused under the circumstances. The City obviously disagreed with the Debtor's position. In addition to the letter, City's counsel was in contact with Debtor's counsel and knew that Debtor was filing its motion triggering the issues raised and would seek an expedited hearing. The City was certainly aware that the hockey season was about to begin and that both parties needed a resolution. The issues raised were extensive and complex. Despite this, the City cooperated fully and caused no delays in consideration of the matter. As a result, the matter was heard as expeditiously and efficiently as could be expected under the circumstances.

The City cooperated fully after the October 4 ruling, as well. The City worked with the Debtor's representatives in having the trade fixtures and personal property removed. The City incurred expenses in having certain items removed itself. It removed the dasher boards on October 11 and stored them numerically in a safe place. The ice resurfacers were parked and covered. The City accounted for the laser lights that the Debtor had alleged were missing. While the Debtor's recovery of the property was not seamless, it was also without incident. In

short, any claim of damages for the City's conduct after October 4 is unfounded.

Fourth, the Debtor failed to prove it was actually damaged by the stay violation.[5] In this regard, Scott Moore, the Debtor's vice president and director of hockey operations, testified that the value of the trade fixtures and personalty would be maximized by selling them as a whole and offering them for sale during the prime selling season of July through August. He testified that the Debtor's damages should reflect this lost opportunity. He also testified that the Debtor's objective from the outset was to sell the trade fixtures and personalty. He apparently felt a need to so testify as his claim of damages based upon the lost opportunity is premised upon the Debtor's intention to sell the personal property and trade fixtures at the time the bankruptcy was filed. This testimony is ultimately self-serving and unconvincing. A review of the Motion, the Debtor's briefs filed in support of the Motion, the evidence submitted at the September 25, 2002, hearing, and counsel's time records introduced at the present hearing, reflects that the Debtor's overriding objective in filing the bankruptcy and initiating the Motion was to reinstate the lease and the franchise. Richard Moore, Scott Moore's father, and the principal and president of the Debtor, admitted as much during his testimony at the present hearing. Mr. Moore obviously has a large investment in the Debtor and considered an ongoing operation as the best means to recover a portion if not all of his investment. A sale of the franchise, as opposed to specific assets, was also a possibility. Removal of the trade fixtures and personal property for purposes of a sale of such items during August and September, 2002, would have rendered this objective impossible.

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[5]The court's conclusion that the Debtor failed to prove damages resolves this case in the City's favor, regardless whether the stay violation was willful or not.

It would be unfair to deny damages solely on the basis that, at the September 25 hearing, the Debtor's argument centered on the lease termination issue. The court recognizes that the Debtor's theory was that the lease termination created a domino effect – cancellation of the franchise and possible loss of all the Debtor's leasehold improvements, trade fixtures, and personal property. The City, likewise, took an all or nothing approach – lease termination triggered lease provisions that caused the leasehold improvements, trade fixtures, and personal property to revert to the City. However, to contend that the Debtor is entitled to damages based on the Debtor's inability to sell the personal property and trade fixtures, when the Debtor had no actual intent to sell the personal property and trade fixtures, is disingenuous. At most, the Debtor was denied access to the personal property and trade fixtures from the time of the filing until the October 4, 2002 ruling. The City maintained the personal property and trade fixtures and made the Coliseum hockey-ready during this interim and thus, very likely, enhanced the value of the personal property and trade fixtures.

The evidence does not establish that the City damaged, destroyed, or concealed any of the personal property or trade fixtures. The Debtor did not experience a loss of income occasioned by the City's retention of control of the property. Any loss of income resulted from the City's termination of the lease which, as the court previously held, did not constitute a stay violation. There is certainly support in the law that a debtor may recover, as actual damages, rental costs for property unlawfully withheld from the debtor by the stay violator. *See In re Jackson*, 251 B.R. 597, 601-02 (Bankr. D. Utah 2000); *In re Zaber*, 223 B.R. 102, 107 (Bankr. N.D. Tex. 1998); *Brooks v. World Omni (In re Brooks)*, 207 B.R. 738, 742 (Bankr. N.D. Fla. 1997). In such cases, however, rental costs represented the funds that the debtor expended, or would have had to

expend, to replace the withheld property during the period that such property was withheld in violation of the stay. *See id.* The court has found no support in the law for the proposition that a debtor may recover rental costs from a stay violator as measured by the violator's use of the estate's property.

Finally, a debtor may recover its reasonable expenses incurred in physically recovering the withheld property, if the creditor does not reasonably return such property to the debtor at its own expense. *See, e.g., In re Brooks*, 207 B.R. at 742; *Beair v. Polhamus (In re Beair)*, 168 B.R. 633, 637 (Bankr. N.D. Ohio 1994). However, as the Debtor would have had to remove its equipment from the arena anyway, following the termination of the lease, the Debtor has not incurred any removal expenses as a *result* of the City's stay violation.

Given the facts and circumstances of this case, the court will not impose a standard that imposes liability for conduct that is something less than willful. It is not necessary or appropriate in this case to assess damages as a means to vindicate the provisions of section 362 of the Code. The Code and its policies will survive conduct such as the City's here.

Attorney's fees as an element of damages are denied. The stay violation was not willful; the Debtor incurred no actual damages. An award of attorney's fees would be improper. *See, e.g., In re Hill*, 19 B.R. 375, 379-80 (Bankr. N.D. Tex. 1982).

B. Characterization of Property

The court, in its October 4, 2002 ruling, held that the Debtor retains its personal property and trade fixtures. The court determined that the evidence was insufficient to allow the court to make any decision regarding the characterization of specific items of property. The court did, however, define a trade fixture "as an item that can be removed without material alteration or

permanent injury to the freehold and which the tenant annexes to realty to enable the tenant to carry on its business, trade, or profession." *See* Court's October 4 ruling at 23. *See also Reames v. Hawthorne-Seving Inc.*, 949 S.W.2d 758, 761 (Tex. App. – Dallas 1997, writ denied); *Neely v. Jacobs*, 673 S.W.2d 705, 707 (Tex. App. – Fort Worth 1984, no writ); *Connelly v. Art & Gary Inc.*, 630 S.W.2d 514, 515 (Tex. App. – Corpus Christi 1982, writ ref'd n.r.e.).

The City, relying on the Texas Supreme Court case of *Logan v. Mullis*, 686 S.W.2d 605 (Tex. 1985), argues that the characterization of certain items of property as a fixture resolves the ownership in the City's favor. The court, however, draws a distinction between a fixture and a trade fixture.

The *Logan* case set forth the three factors to consider in determining "whether personalty has become a fixture, that is, a permanent part of the realty to which it is affixed: (1) the mode and sufficiency of annexation, either real or constructive; (2) the adaptation of the article to the use or purpose of the realty; and (3) the intention of the party who annexed the chattel to the realty." *Logan*, 686 S.W.2d at 607-08. The third factor dealing with intent is preeminent, while the first and second factors constitute evidence of such intent. *See id.* Intent is made apparent by objective manifestations. *See id.* Thus, the above forms the test for determining whether an item of personality becomes a fixture. *See id.*

While a trade fixture is similar to a fixture, in the sense that a trade fixture is an item of personality that has been annexed, a trade fixture is "to be distinguished from other fixtures attached to the property." *Jim Walter Window Components v. Turnpike Distribution Ctr.*, 642 S.W.2d 3, 5 (Tex. App. – Dallas 1982, writ ref'd n.r.e.). Texas case law treats trade fixtures as a subset, or a special type, of fixtures – in order for an article of personalty to be a trade fixture, it

must first be a fixture generally. *See id. See also Moskowitz v. Calloway*, 178 S.W.2d 878, 880 (Tex. Civ. App. – Texarkana 1944, writ ref'd w.o.m.) (discussing how trade fixture is a type of fixture, and if personalty claimed to be trade fixture is not removable without material alteration or permanent injury, such personalty is a general fixture); *Nine Hundred Main Inc. v. City of Houston*, 150 S.W.2d 468, 471 (Tex. Civ. App. – Galveston 1941, writ dism'd judgm't cor.) ("That there exists in the same and similar business relationships such a distinction between 'alterations, additions, or improvements,' and 'fixtures,' is recognized quite generally by the authorities, especially those in Texas. Such 'fixtures' as these parties thus appear to have mutually had in mind are classified in Texas as 'trade fixtures,' 'agricultural fixtures,' and fixtures established for ornament, convenience, or domestic use, hence are removable on termination of the lease, if that can be effected without substantial injury to the freehold").

In addition to the three-factor test for determining whether an item of personality becomes a fixture, therefore, an article of personality is a trade fixture if three additional elements are met: the article must be annexed in the context of a lease; the article must be annexed by the tenant to enable the tenant to carry on its business; and the article must be removable without material alteration or permanent injury to the freehold. *See id.* If these three elements are met, the article is not treated as a general fixture, but is instead treated as a trade fixture.

With the foregoing analysis in mind, the court will address certain items of property that were raised by the parties during the trial of this matter.

Ice Resurfacers, Goal Judge Boxes, Homosote, and VIP Parking

The ice resurfacers, the goal judge boxes, the homosote, and the materials making up the

VIP parking constitute personal property. These items are not attached to the realty. Without annexation, they are neither improvements nor fixtures. *See, e.g., Gawerc v. Montgomery County*, 47 S.W.3d 840, 842 (Tex. App. – Beaumont 2001, pet. denied) ("both an improvement and a fixture require annexation to realty, and until something is annexed to realty, it is neither an improvement nor a fixture").

Dasher Boards, Plexiglass, Shot Clocks, and Laser Lights

Debtor installed each of these items for the operation of its business. The evidence established that each of these items was, at most, connected to the realty by bolts, screws, gravity, or friction. Even assuming that these items were annexed to the realty, the evidence further established that each of these items was removed with no alteration or injury to the realty. Thus the definition of trade fixture is met with respect to each of these items. Additionally, there appears to be no real argument that these items were anything other than trade fixtures.

Ice Floor

The evidence established that the ice floor consists of several miles of pipe buried under a thin layer of special concrete. The coolant, Glycol, is cooled to below freezing temperature and flows through the pipe, cooling the layer of concrete to below freezing, thereby freezing water on the surface of the ice floor once the floor is flooded with a thin layer of water. The removal of the ice floor would require jack-hammering out tons of concrete, followed by removal of the pipes, followed by poring and resurfacing a new layer of concrete. Removal of the ice floor, therefore, cannot be accomplished without major demolishing and rebuilding. Additionally, the ice floor was never an article of personalty – it was always an integral, permanent, and irremovable part of the arena. Thus, the ice floor is an improvement, to which the City gained

title upon installation.

Glycol

The evidence established that many gallons of Glycol flow through the pipes under the ice floor. The Glycol is cooled by the ice plant to temperatures below freezing. Whether in use or not in use, the Glycol rests in the pipes under the ice floor; the ice plant merely circulates and cools the Glycol. While it is uncontested that the Glycol may be removed from the pipes by blowing compressed air through one end of the pipes and collecting the Glycol in barrels at the other end, it is illogical to argue that the Glycol is personalty or a trade fixture. The Glycol is an integral component part of the ice floor which, as previously noted, is an improvement.

The ice floor is composed of more than its two-dimensional surface. It consists of the surface, the concrete, the piping, and the Glycol. Removing the Glycol from the ice floor renders the ice floor inoperable, and no longer an ice floor. To argue that the Glycol is a trade fixture is to argue that the oil in an engine, or the Freon in an air conditioning compressor, is something other than an integral part of the machine which depends on it. When one purchases a refrigerator, he certainly expects such refrigerator to come with Freon already in its compressor. Similarly, when the parties contemplated the idea of an ice floor, they necessarily included within that idea not only such items as concrete and pipes, but also coolant. This argument can be taken to extremes: if the Glycol is an integral part of the ice floor, then why aren't the ice resurfacers integral parts of the ice floor, since the ice floor requires both to function as an ice floor? The difference, however, is that the Glycol rests in the ice floor. The Glycol is an internal part of an improvement, as opposed to some external part on which such improvement relies. The Glycol, therefore, is not a trade fixture or an item of personalty.

Metal Shed

Debtor argues that the metal shed erected to house the ice plant is a trade fixture. The shed sits on a slab of concrete, a few feet from the arena. The shed is welded to anchors embedded in the concrete. Debtor argues that the shed could be easily cut from the anchors, the concrete dug up, resulting in the same condition of the premises as existed before the lease. Debtor points to the fact that the dirt remaining after removal of the shed and slab would be the same dirt that existed in the same location prior to the lease.

However, with respect to the metal shed, Debtor runs into a problem not present with other articles, because the metal shed has been annexed to the soil. An improvement includes an item which, "in contemplation of law, [is] annexed to the soil." *Big West Oil Co. v. Williborn Bros. Co.*, 836 S.W.2d 800, 802 (Tex. App. – Amarillo 1992, no writ). Thus, when an item is annexed to the soil, as opposed to a wall, floor, or ceiling, the appropriate legal analysis is not to look at such item as a fixture or as a trade fixture, but as an improvement. "The general rule is that permanent annexation to the soil of a thing in itself personal makes it a part of realty." *Cantu v. Harris*, 660 S.W.2d 638, 640 (Tex. App. – Corpus Christi 1983, no writ), *citing Missouri Pac. Ry. Co. v. Cullers*, 17 S.W. 19, 22 (Tex. 1891). *Accord Griggs v. Magnolin Petroleum Co.*, 319 S.W.2d 818, 820 (Tex. Civ. App. – Amarillo 1958, no writ). A building permanently attached to a concrete slab or foundation is annexed to the soil. *See Cantu*, 660 S.W.2d at 640; *Griggs*, 319 S.W.2d at 820. In the absence of a contractual provision to the contrary, or an objective intent not to make the building a permanent part of the soil, such building is an improvement – it ceases to be personalty or a trade fixture. *See Cantu*, 660 S.W.2d at 640-41 (finding that metal building attached to concrete slab was not an improvement

or fixture because plaintiff failed to prove that building was permanently attached to realty).

In the present case, the metal shed was permanently attached to the concrete slab with welds. The shed was not held on to the slab merely by force of gravity, or by bolts. While a weld may be cut, such cut is a destruction; it is not merely a separation of two separate parts. Thus, the metal shed was permanently attached to the concrete slab, meaning that the shed was permanently annexed to the soil. As such, the shed is an improvement. No evidence of objective intent was offered to prove that the parties intended that the shed be anything other than permanently attached to the concrete slab. *See Griggs*, 319 S.W.2d at 819 ("it is well established in this state that a building or other construction erected and attached upon land so as to make it a permanent fixture becomes a part of the freehold in the absence of any intention or agreement on the part of the interested parties that such building should not become permanently annexed to the soil"). With nothing in the evidence to the contrary, the shed – as an improvement – is the City's property.

Ice Plant

Characterization of the ice plant presents the most difficult question. The court concludes that the ice plant is a trade fixture. The ice plant meets the definition of trade fixture. In this context, the size of the ice plant is not determinative. Nor is evidence to the effect that Debtor intended for the ice plant to be a permanent part of the realty. What is determinative is that the ice plant was removed from the shed with minimal alteration or injury, if any. Pipes were cut and capped, as were electrical lines.

It may be argued that the ice plant, like the Glycol, is an integral part of the ice floor, which is an improvement. If the ice plant is an integral part or component of the ice floor,

inasmuch as the ice floor is not an ice floor without its ability to make ice, the ice plant is not a trade fixture. However, the ice floor is fully capable of functioning as an ice floor without Debtor's ice plant, if a different tenant hooks up his own ice plant. A temporary ice plant was in fact used here after the Debtor removed the ice plant. Thus, the ice plant is not an integral component part of the floor; unlike the Glycol, it is external to the floor.

Conclusion

The court denies the City's request for damages and attorney's fees arising from the City's violation of the automatic stay. In addition, the court finds that the ice resurfacing machines, the goal judge boxes, the homosote, and the materials associated with the VIP parking constitute personal property and therefore belong to the Debtor. The dasher boards, plexiglass, shot clocks, and laser lights constitute trade fixtures that are removable without damage to the realty. The ice floor and the metal shed constitute improvements belonging to the City. In this regard, the court concludes that Glycol is an integral component of the ice floor and thus is neither a trade fixture nor an item of personalty. It therefore belongs to the City. Finally, the ice plant constitutes a trade fixture removable by the Debtor.

Signed March 13, 2003.

ROBERT L. JONES
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

IN RE:	)	
	)	
SAN ANGELO PRO HOCKEY CLUB, INC.	)	CASE NO. 02-60321
	)	
	)	

JUDGE'S RULING

OCTOBER 4, 2002

On the 4th day of October, 2002, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable Robert L. Jones, Judge Presiding, held in Lubbock, Texas.

Reported by:
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APPEARANCES

For the Debtor
San Angelo Pro Hockey Club, Inc:

MR. DAVID WEITMAN
- AND -
MS. JAMIE LAVERGNE BRYAN
Hughes & Luce
1717 Main Street, Suite 2800
Dallas, Tx 75201

For the Creditor,
The City of San Angelo:

MR. SAMUEL ALLEN
- AND -
MR. KEN STOHNER
Jackson Walker
301 W. Beauregard
San Angelo, TX 76903
- AND -
MS. MINDY WARD

Also Present:

Mr. Robert St. Clair
Mr. Adams
Mayor Izzard
Mr. Michael McEnrue
Councilman Jim Hughes

P R O C E E D I N G S

THE COURT: I'm present here in the courtroom. For the record, the Court will call the San Angelo Pro Hockey Club, Inc. case, Case Number 02-60321. We have in the courtroom Mr. St. Clair. Let me go ahead and get everybody that's present on the phone.

MR. WEITMAN: Your Honor, David Weitman and Jamie Laverne Bryan with the law firm of Hughes & Luce on the line on behalf of the debtor.

MR. ALLEN: Your Honor, this is Sam Allen. Ken Stohner is also on the line with Jackson Walker here on behalf of the city. Also present in my office here in San Angelo, Mindy Ward with the city legal staff, Mr. Adams, Mayor Izzard, Michael McEnrue and Councilman Jim Hughes.

THE COURT: Very well. If you'll give me just a moment, I have to grab one other note that I had, so bear with me.

(A brief break was taken.)

THE COURT: Very well. The Court notes that hearing on this matter -- and it's actually two matters that were before the Court, one is the motion by the debtor, San Angelo Pro Hockey Club, Inc., for an order imposing and award of damages, and alternatively, for civil contempt against the City of San Angelo regarding violation of the automatic stay.

Secondly, we have a motion by the city for stay of

proceedings and abstention. The hearing was held on these matters on September 25th. I believe that was last Wednesday. At the conclusion of the hearing, the Court granted the city until Monday the 30th of this week to file a reply brief and the debtor was granted until Wednesday, October 2nd to file its own brief in reply to the debtor's reply brief.

The Court received both of those briefs, and obviously considered those in connection with its ruling here today. The Court yesterday advised the parties that it would issue its ruling at 3:00 today. I'm doing this on the record as a means to expedite matters, as I know that there is some urgency to the situation.

I will go ahead at this time and give the parties a summary of the Court's ruling, so you don't have to wade through the entirety of the Court's findings and conclusions to find out what I have decided. To the extent the summary conflicts with the more extensive findings and conclusions, the findings and conclusions will be controlling. I don't think they conflict. But in any event, there are basically six matters or six items involved in the summary of the Court's ruling.

First is that there is no stay violation with respect to the leasehold, as the Court finds the lease was terminated prior to the bankruptcy.

Second, there is a stay violation as to personal

property and trade fixtures owned by the debtor. The Court finds that as of the filing, these items were property of the bankruptcy estate.

Third, the evidence is insufficient to determine the characterization of specific items of property, indeed, this issue was not litigated.

Fourth, the issue of damages and any questions regarding characterization of specific items of property, if there are any such questions, shall be set on the Court's November 7, 2002 San Angelo docket. That's a video docket and contemplates hearings for the week of November the 11th.

Fifth, the Court makes no findings regarding the debtor's rights to payments from concessions. And therefore, the findings here shall not constitute a bar to litigation over any claim regarding concessions.

Sixth, that all other relief requested by either of the parties under their motions is denied.

Now I'll go through the Court's findings and conclusions. The debtor's motion was filed on August the 28th. At the hearing held last week, the parties stated that they had agreed to essentially bifurcate the issues and to have the damage issue heard at a later date.

By the motion, the debtor asserts the city had violated and is violating the automatic stay imposed by Section 362 of the code. To determine this issue, the Court

must determine whether the property rights involved are property of the bankruptcy estate.

The Court separates the right into two categories, first the leasehold interest, and second, what I will refer to as all other property, which would include the leasehold improvements, fixtures, trade fixtures and personal property. I will frequently refer to other property, and that is my shorthand version or way of referring to basically everything except the leasehold interest.

The Court finds it does have jurisdiction over a question of whether a stay violation has occurred or is occurring. Under 28 U.S.C. Section 1334(b), the Court finds this is a core proceeding as it concerns Section 362 and the effects of the automatic stay as well as Section 541, dealing with property of the estate and generally concerns matters affecting the administration of the bankruptcy estate.

Section 541 of the code defines property of the estate to include all legal or equitable interest of the debtor in property as of the commencement of the case. It does not matter where the property is located or by whom it is held. An analysis of whether the debtor retains a leasehold interest begins and ends with the July 10, 2002 arbitration decision by Mr. Tidwell.

Because of defaults by the debtor in making payments, the city requested that the issue of lease termination be

submitted to arbitration. The first evidence of this is the March 21, 2002 letter, I believe it's the City's Exhibit 18, a letter from Mindy Ward, the city attorney, to the debtor with a copy to Central Hockey League, and obviously to the debtor's attorney, requesting that this issue be submitted to arbitration or stating that it would be submitted to arbitration.

This was made in accordance with the parties May 26, 2000 agreement, which is Exhibit Eight, under which the parties agreed to submit certain issues to binding arbitration. Specifically, and again I'm referring to Exhibit Eight of the debtor, the agreement for limited arbitration, at paragraph four B states that the parties agree that the following matters are submitted to mandatory binding arbitration, and B is any future matter pertaining to the enforcement of the lease, interpretation, breach or termination of the lease, as distinguished from and excluding any matters of renegotiation of the lease.

Paragraph five of that agreement specifically provides that arbitration is to be conducted under the provisions pertaining to the Texas General Arbitration Act, specifically Section 171 of the Texas Civil Practice and Remedies Code.

In accordance with this, the arbitration was held, apparently on May the 10th of 2002. In connection with the

arbitration, the parties submitted a stipulation of facts and evidence, that's the City's Exhibit 19.

After the arbitration was held before Mr. Tidwell, the parties submitted additional authorities on issues requested by the arbitrator. As I've indicated, Mr. Tidwell issued his decision, it's dated July 10th of 2002, and is Exhibit 11. The decision addresses the defaults that were raised, the notices that were provided, the city council's authorization to the city to seek arbitration for purposes of terminating the lease. It states that in February and March the city had the right to terminate then but that the city chose, in Mr. Tidwell's words, the safer path by submitting the question of termination to arbitration.

He considered the fact that termination is indeed a harsh remedy, but found that the hockey club was before the arbitrator, as he says, with unclean hands, and therefore, was not entitled to equitable consideration in connection with termination of the lease.

He also considered waiver of termination by the city's acceptance of payments. And in the final analysis held that the city had the right to terminate and specifically said as such that the city had the right to terminate this lease due to the past defaults of the hockey club and may do so by notifying the hockey club of termination by certified mail upon receipt of the award.

Therefore, the only condition to termination in the award is the notice by certified mail. The city council at a July 16 meeting voted to go forward with termination of the lease. It is unclear whether this was required. Again, it may simply be an example of the city taking a more cautious approach. Especially in light of the fact that the arbitrator had specifically found that the city had authorized the city staff to proceed with arbitration for purposes of terminating the lease.

The next question --or the question that is raised is whether this Court is bound by the arbitration decision. There are no issues or questions raised concerning the validity of the parties agreement to arbitrate the lease termination issues, or that the issue was properly submitted to the arbitrator, or that the arbitrator had authority to decide lease termination issues.

The Court looks to Texas law to determine whether this Court is bound by the arbitration award. In this regard, the law provides that if the parties to an arbitration agreement agree to state law rules for arbitration in the agreement itself, the state law rules of decisions and arbitration apply in Federal Court. However, the parties must have clearly evidenced their intent to apply the state rules. If the parties clearly evidence an intent to apply said arbitration law, such intent must be honored by the Court.

The arbitration agreement at issue here provided that binding arbitration shall be conducted under the provisions of the Texas General Arbitration Act. In addition, Texas law provides that an arbitration award has the same effect as the judgment of a court of last resort. Arbitration awards are favored by the courts and every reasonable presumption should be indulged to uphold the arbitration award. As with a judgment, principles of res judicata and collateral estoppel apply to arbitration awards as well.

As to vacating the arbitration award, the Court looks again to Texas law, specifically Section 171 of the Texas Civil Practice and Remedies Codes provides the grounds for vacating an arbitrator's award. The statutory ground generally involves misconduct by the arbitrator or an award, an arbitration award, obtained through fraud or some other improper means. These are not alleged here.

In addition to the statutory grounds for vacatur, Texas courts recognize certain common law grounds for vacatur. One of the more common grounds raised under common law is whether gross error was committed by the arbitrator. In this context, most Texas courts hold that gross error is in and of itself insufficient, that the arbitrator must have committed such gross error as would imply bad faith or a failure to exercise an honest judgment. A gross mistake results in a decision that is arbitrary and capricious. An honest judgment

may, after due consideration given to conflicting claims, however erroneous is not arbitrary and capricious.

If the arbitrator committed a mere mistake of fact or of law, a court shall not vacate the award. However, when a mistake of fact or law results in a great and manifest wrong and injustice, the court then has some authority to vacate the award. However, there are no published Texas cases that we have found that elaborate on what is meant by great and manifest wrong and injustice.

Upon review of the agreement to arbitrate and the issues presented to the arbitrator here, the Court cannot conclude that the arbitrator committed a gross error or that he made such a mistake of fact or law so as to render the decision a great and manifest wrong and injustice. Therefore, the Court concludes the decision is obviously not arbitrary and capricious and does not imply bad faith.

While the Court may not necessarily agree with the decision of the arbitrator, this does not constitute a basis for setting aside the award. The Court is not persuaded by the arguments raised by the debtor, specifically that, first, the effect of the prior arbitration award by Judge Steib whereby any defaults or in this case termination be considered to have occurred at the time of the arbitration. Second, that notice provisions of a lease, specifically 16.1 and 16.2 require in effect that the debtor be given 45 days to cure.

Third, that the conditional assignment, Debtor's Exhibit 18, the assignment agreement between the debtor, the city, and the league, that such agreement requires a separate and additional 21 day notice, I would note after the 45 days, to the league, the Central Hockey League, in an opportunity to cure on the league's part.

The Court cannot conclude that the arbitrator did not consider these issues. As I've already noted, the arbitrator did make specific findings regarding the notices provided. He did state the debtor had unclean hands, which may address some issues raised by Judge Steib in which he states as a condition to deferring consideration of when the default or termination occurs that the party be proceeding in good faith.

If the arbitrator, Mr. Tidwell, did not consider these issues, the Court must presume that the debtor had an opportunity to raise these issues with the arbitrator. The issue of termination generally was before the arbitrator and the debtor was bound by his findings. Therefore, the Court will not disturb the arbitration decision. The lease was terminated. The debtor holds no leasehold rights, and thus, there is no stay violation with respect to the lease.

Now I will turn to the, what I referred to earlier as the other property. I would first note that the arbitration award does not address the other property. We do have a threshold question that is raised by the city as to whether

the Court should abstain and allow any disputes regarding the other property to go to binding arbitration.

The arbitration or -- excuse me -- the agreement to arbitrate provides for mandatory arbitration of any future matter pertaining to breach or termination of the lease. Arbitration agreements are to be construed broadly under Texas law. Disposition of the other property here is indeed impacted by termination of the lease. Issues concerning disposition of other property are therefore most likely arbitral under the parties agreement.

The Fifth Circuit has held that a Bankruptcy Court has substantial discretion to refuse to enforce an otherwise applicable arbitration agreement when the underlying nature of the proceeding derives exclusively from the provisions of the code and the arbitration of the proceeding conflicts with the purposes of the code.

To refuse arbitration, the cause of action must arise from federal rights provided by the code as opposed to pre-petition, legal, or equitable rights. If this requirement is met, the court may refuse arbitration if the court is of the opinion that arbitration would be inconsistent with the purposes of *the code*, including, and I quote, the goal of centralized resolution of purely bankruptcy issues, the need to protect creditors and reorganizing debtors from piecemeal litigation, and the undisputed power of the bankruptcy court

to enforce its own order.

In this regard the Court cites to the Gandy -- in the matter of the Gandy case, Fifth Circuit, 2002 opinion. So long as the action is derived exclusively from the code, it does not matter if such action will necessarily involve nonbankruptcy contractual issues on the periphery.

The automatic stay is among the most basic of debtor protections afforded under the Bankruptcy Code. The automatic stay is an injunction issuing from the authority of the Bankruptcy Court. Obviously Bankruptcy Courts have the ultimate authority to determine the scope of the automatic stay imposed by Section 362 subject to Federal appellate review.

Thus although the proceeding here involves issues that do not arise exclusively from the provisions of Title 11, the proceeding itself, and proceeding being the operative Fifth Circuit standard arises exclusively under the provisions of Title 11.

The Court notes or cites to the case of In Re: Grant, a Southern District of Alabama decision --

(Static)

THE COURT: Can y'all still hear me?

MR. ALLEN: This is Sam Allen. I think we've lost our connection. Is anybody else on the line?

MS. WARD: I'm on the line, Sam, but we can't

hear the Court.

MR. STOHNER: I'm on the line and I can't hear the Court either.

THE COURT: We're getting a lot of static on this end.

MR. ALLEN: I think we lost you for about two minutes there when you made reference to the Grant case. That's the last thing I heard.

THE COURT: I stopped because we were getting a lot of static on this end.

Mr. Weitman, are you there?

MR. WEITMAN: I am.

THE COURT: Can you hear me?

MR. WEITMAN: Yes, Your Honor.

THE COURT: Mr. Stohner, can you hear me?

MR. STOHNER: Yes, sir.

THE COURT: And Mr. Allen, you can hear me too, I take it?

MR. ALLEN: Yes, that's much better now. Thank you.

MR. WEITMAN: I think we all lost you, Your Honor, as Mr. Stohner said right after you referenced the In Re: Grant case.

THE COURT: Okay. With respect to the Grant case, that's a Southern District of Alabama case, 281 BR 721,

where the Bankruptcy Court declined to refer issues connected to the debtor's claim of a stay violation to arbitration. The Court noted that violation of the stay affects only the debtor and one creditor directly, but impacts the effect and weight of court orders in general which affects all creditors.

The court there found that arbitrating the adversary would present a conflict of the code, because it would allow an arbitrator to effectively decide whether and how to enforce a Federal injunction, something that is entirely within the Bankruptcy Court's power. The court refused to refer the adversary to arbitration, even though the action there overwhelmingly involved pre-petition state law contractual rights.

Because adjudication of those rights would effectively adjudicate the stay violation issue, which the court held was the core issue of crucial importance to the court, the arbitrator would in effect be deciding the stay violation issues. With respect to the case at bar, admittedly the resolution of the stay violation issue will necessitate or does necessitate a resolution of the debtor's pre-petition contractual rights; however, the debtor's action seeks to enforce a right provided exclusively by the Bankruptcy Code. Those are rights afforded by Section 362, the automatic stay.

That the Court will have to consider state law pre-petition contractual issues does not destroy the Court's

discretion to refuse arbitration because the Court will consider such issues only peripherally. Indeed in order to find a stay violation in any case, the court must conclude that property was property of the estate, otherwise by definition, no stay violation could have occurred.

Additionally, before the Court may refuse arbitration, the Court must find that arbitration would conflict with the purposes of the code, including the goal of centralized resolution of purely bankruptcy issues, the need to protect creditors and reorganizing debtors from piecemeal litigation, and the undisputed power of the bankruptcy court to enforce its own orders. The automatic stay is in effect an injunctive order of the court. Thus because bankruptcy court has the undisputed power to enforce its own orders, arbitrating matters that would effectively decide the issue for the court would conflict with the code.

The bankruptcy court is best suited to decide whether its injunction is violated and has the right to so decide. The Fifth Circuit in the Gandy case analyzed several subsidiary issues in affirming a refusal to order an avoidance action to arbitration. The Court strongly hinted that arbitration of claims may be refused when their resolution implicates matters central to the purposes and policies of the bankruptcy code.

Second, the court found it noteworthy that the claim

sought to be arbitrated represented very nearly the entirety of the debtor's estate. Third, the court considered the effect of arbitration on the central purposes of the code. That being the expeditious and equitable distribution of the assets of the debtor's estate. Finally, the court noted that efficiency concern could present a conflict between the code and arbitration.

All of these concerns are applicable to the case at bar. First, we do have issues that impact the automatic stay. Second, the other property, as I referred to it, may very likely represent the entirety of the debtor's estate. Third, allowing arbitration now will simply serve to delay resolution of the issue at additional cost.

As the Fifth Circuit noted in the National Gypsum case in the bankruptcy context efficient resolution of claims and conservation of the bankruptcy estate assets are integral purposes of the Bankruptcy Code. The Court is fully aware that the hockey season begins shortly, and that both the debtor and the city need to be advised of their respective property rights that have been raised herein.

Based on these considerations, the Court denies abstention and arbitration and will proceed to determine the rights to the other property and whether stay violation has occurred. In this regard, the Court turns to the lease itself, which is the Debtor's Exhibit Five.

There are at least six different provisions that address the parties rights to the other property. These provisions are Sections 3.1, 3.8, 3.9, 6.2, 6.4 and 18.2. Section 3.1, and I will paraphrase these to some extent, provides that the lessee, that being the debtor, has the obligation to, at its own expense, to construct an indoor ice arena, which shall include but is not limited to an ice floor, refrigeration equipment, hockey dasher boards, score boards, insulated floor, ice resurfacing machine and edger.

Section 3.8 provides that all of the permanently installed improvements become property of the city upon installation. Section 3.9 provides that all equipment specified in section 3.1 becomes property of the city at the end of the lease and further states that the lessee, that again being the debtor, is required to execute all necessary documentation to effect the transfer of such property within 30 days of the termination of the lease.

I won't go into 6.2 and 6.4 specifically, but they also, each one contains provision addressing rights to the other property. 18.2 of the lease states that the lessee agrees to deliver possession of the premises and all buildings, improvements, and fixtures to the city upon termination of the lease. It also provides that all items of personal property, including furniture, machinery, equipment, and trade fixtures remaining in or on the premises after the

expiration of 15 days following the termination of the lease shall be deemed abandoned by the lessee and shall become property of the city.

The city construes these provisions to state -- and takes the position that they essentially get everything. In addition to these provisions, we have the August 2 letter which is Debtor's Exhibit 16 from, I believe it's Mindy Ward, the city attorney, stating that the club may -- and when I say club I'm obviously referring to the debtor -- may pick up certain specific items of personal property and that they have until August 19th to do so.

The Court notes that the property is specifically described as an ice sprayer, carpets, goals, banners, shovels, paint, hockey pads, skates, a homemade table, promotional game boards, promotional items, and laser lights. The Court construes the rights to the other property under the lease and will then address whether the debtor has abandoned its rights under Section 18.2 and under the terms of the August 2 letter.

The lease provisions raise certain ambiguities. Section 3.1 specifically mentions items, some of which appear to constitute permanent improvements, some of which appear to constitute fixtures, some of which appear to constitute trade fixtures, and some of which appear to constitute personal property.

Section 3.8 provides that permanently installed

improvements belong to the city upon installation. Section 3.9 states that all equipment in section 3.1 become property of the city at the end of the lease. And as I've already referenced, contains the debtor's obligation to execute documents to effective transfer of title. Section 18.2 clearly implies the debtor retains all items of personal property, including furniture, machinery, equipment, and trade fixtures so long as it is removed within 15 days of lease termination.

The Court cannot fully reconcile these provisions. Sections 3.8 and 3.9 indicate the city gets everything, including trade fixtures and personal property, at least those listed in Section 3.1. However Section 18.2 indicates the debtor retains rights to all trade fixtures and personal property. It is clear under the document that the permanent improvements belong to the city. It is also clear that during the lease term, the debtor owns all personal property and trade fixtures.

Section 18.2 speaks to all items of personal property including those that I've already mentioned. This phrase is inclusive and the specific items enumerated in 18.2 are merely examples of personal property. The problem, however, is that 18.2 taken literally provides that all of debtor's personal property remains debtor's until and unless the debtor fails to remove such personal property from the lease premises.

Section 3.9 states that all equipment specified in Section 3.1 becomes city property. It's unclear exactly what is referred to there by equipment. Does the equipment include all trade fixtures or does it also include all nonannexed fixtures? The lease therefore is not unambiguous regarding the property that is what is essentially a forfeiture. 18.2 can be read as providing that the debtor does not forfeit his personal property upon lease termination, while 3.9 provides a conflicting result.

Texas law holds that the lease must be construed against the lessor. In addition, that the lease must be construed to avoid forfeiture and that the lease must be unambiguous to find a forfeiture, and that the court must be compelled to permit forfeiture by language that is capable of no other interpretation.

The Court concludes based on these principles that the debtor did not forfeit the items of personal property upon lease termination. The lease between the debtor and the city states in Section 3.8 that all permanently installed improvements become the city's property upon installation, and Section 18.1, that improvements and fixtures become property of the city. Improvements are not items of personal property and a fixture is an item of personal property that ceases to be an item of personal property once it has been annexed to the realty.

Given that Section 18.2 mentions trade fixtures as items of personal property, the Court includes such items as personal property for purposes of its ruling. Improvement includes all additions to the freeholds except trade fixtures, which can be removed without injury to the property. A trade fixture is generally defined as an item that can be removed without material alteration or permanent injury to the freehold and which the tenant annexes to realty to enable the tenant to carry on its business, trade, or profession.

Unless the lease clearly provides otherwise, the general rule in Texas is that a tenant is entitled to remove its trade fixtures from the lease premises at the termination of the lease. Given the ambiguities in the contract and Texas law regarding construction of ambiguous terms where a forfeiture is involved, the Court holds that the debtor retains at the time of lease termination an interest in all personal property including property that can be classified as trade fixtures. The city retains the leasehold improvements and fixtures.

Now the question is whether the debtor abandoned its rights by failing to pick up the items of property. The Court holds the debtor did not abandon its right to personal property and trade fixtures. The leasehold and all property is and has been since the filing of this bankruptcy case and before in the possession and control of the city. Other than

a few small items of personal property of little value, the city asserts ownership to all items of property involved.

The debtor had no meaningful opportunity to take possession of the personal property and trade fixtures. There is some evidence that a Skeeter Moore was directed to pick up the property at the coliseum and that none has been picked up. Mr. Adams, the city manager, testified that the debtor requested the return of the Zambonis. It is clear the city was not going to relinquish or would not have relinquished possession of the Zambonis.

The city's argument that the debtor leases all rights or -- excuse me that the debtor loses all rights because of the debtor's failure to timely pick up the items of property is very similar to the debtor's argument that the debtor's failure to sign necessary documents to effect transfer within 30 days prevents title from passing. In both instances the party's relying on the condition of the contract to defeat the other side's rights has total control over the condition. The city literally has the keys and therefore controls whether the debtor can obtain the property. The debtor certainly has control over whether transfer documents are prepared and signed. The Court either holds that the parties are technically bound by both provisions or it construes them in a manner that makes practical sense. The Court chooses the latter.

Therefore, as of the filing of the petition here on August 7th, 2002, the debtor held an interest in all personal property and trade fixtures. The city violates the stay to the extent it retains possession and control of these items of property. As I've already stated, the issue of damages will be decided at a later hearing. The evidence is insufficient to determine how each and every item of personal property -- or excuse me -- property is classified.

To the extent necessary, the Court will allow additional evidence as to the specific items of property. At a continued hearing therefore, the Court will consider both the question of damages and any questions regarding classification of property. Such hearing is set on the Court's November 7th, 2002 San Angelo docket.

The Court makes no findings regarding the debtor's rights to payments from concessions.

Finally, the Court holds that all other relief requested by either of the parties is denied. That concludes the Court's findings and conclusions.

Let me say for the record that I thought the lawyers in this case did an extraordinary job in presenting the issues and submitting briefs that were both well done and very persuasive and raised very difficult issues for the Court. For what all that's worth. I guess I'll ask Mr. Weitman to prepare an order, if you will.

MR. WEITMAN: Your Honor, may I ask one question if it is possible. Your Honor, I noted in your various findings of fact and conclusion of law, there was no reference, I don't believe, to the idea that the arbitration award could be basically based on the arbitrator having exceeded his powers or authorities, which is a ground under the Texas Arbitration Statute. And in looking at defining that, we obviously look to various other authorities as to whether or not the arbitrator ignored the plain and unambiguous language of various contracts. Did the Court specifically find that that basis of exceeding powers or authority or otherwise failing to draw the essence from the contract which is a ground under Texas Arbitration Statute, whether that was met or not met?

THE COURT: Well, obviously the Court found that there are not sufficient grounds to overturn the arbitration award, so other than that and what I've already stated on the record, that's all I'm willing to say at this time.

MR. WEITMAN: Thank you, Your Honor. May I ask one other question, I guess, and that is, we now have a city in possession and control of our property. And there's a continuing violation of the stay. How would Your Honor imagine I might be able to recover some of this property?

THE COURT: I would imagine that you can figure that out on your own.

MR. WEITMAN: Okay. I mean we can -- so there is a continuing violation so long as they're not allowing us to recover?

MR. STOHNER: Your Honor, I'm not sure what the purpose of this is. I think we need to have an order entered. We've each heard what you have said, and I think will obviously need to review that, and I assume we may be in communication with each other. But unless the Court is entertaining other motions here, I'm not sure what we're doing.

THE COURT: No, I'm not interested in entertaining more questions. I have ruled the way I've ruled. The only issue before the Court is whether a stay violation has occurred.

Let me give you the -- if y'all wish to obtain a transcript of the ruling, I'm sorry we couldn't get anything out in writing, but we were just too pressed for time. The court reporter is Linda York, Y-O-R-K. Their phone number is 806-763-0036. Did y'all get that?

MR. WEITMAN: We did. Thank you, Your Honor.

MR. ALLEN: Yes, Your Honor.

THE COURT: If there's nothing further, we will be in recess then.

MR. WEITMAN: Your Honor, David Weitman again. I just thank the Court for all the time the Court has devoted

to this and how helpful it is to get a prompt decision. We certainly appreciate, everyone here on the call appreciates that.

THE COURT: I appreciate that. Thank y'all.

MR. ALLEN: Thank you, Your Honor. Good-bye.

(Proceedings concluded.)

REPORTER'S CERTIFICATE

THE STATE OF TEXAS)

COUNTY OF LUBBOCK)

I, Linda York, Texas Certified Court Reporter and Registered Professional Reporter, hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceeding in the above styled and numbered Cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that I am neither attorney nor counsel for, related to, nor employed by any of the parties or attorneys of record in this cause, nor do I have a financial interest in the action.

Witness my hand this the 7th day of October, 2002.

Linda York

Linda York
Certified Court Reporter
Certificate No. 4899
Expiration Date: 2/31/03
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